

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

FILED BY CLERK

APR 25 2008

COURT OF APPEALS  
DIVISION TWO

PETER WARNER,

Petitioner Employee,

v.

THE INDUSTRIAL COMMISSION OF  
ARIZONA,

Respondent,

MATALONE CONSTRUCTION,

Respondent Employer,

STATE COMPENSATION FUND OF  
ARIZONA,

Respondent Insurer.

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2 CA-IC 2007-0005

DEPARTMENT B

MEMORANDUM DECISION

Not for Publication

Rule 28, Rules of Civil

Appellate Procedure

SPECIAL ACTION - INDUSTRIAL COMMISSION

ICA Claim No. 89254-118493

Insurer No. 89-44073

LuAnn Haley, Administrative Law Judge

AWARD AFFIRMED

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V Á S Q U E Z, Judge.

¶1 In this statutory special action, petitioner Peter Warner contends the administrative law judge (ALJ) erred in finding his medical condition was stationary, awarding him supportive medical care, and closing his workers' compensation claim. He asserts the ongoing care was designed to improve his "subjective complaints" of pain; therefore, his condition could not have been stationary, and the treatment should have been characterized as active rather than supportive care. Finding no error, we affirm.

### **Factual and Procedural Background**

¶2 We view the evidence in the light most favorable to upholding the Industrial Commission's findings and award. *Polanco v. Indus. Comm'n*, 214 Ariz. 489, ¶ 2, 154 P.3d 391, 392-93 (App. 2007). In 1989, Warner injured his back in the course of his employment when he fell off a ladder. He had two surgeries in the week following the injury, a third surgery six to eight weeks later, and a fourth in 1992. In 1995, his case was

closed with a twenty percent permanent partial impairment and a supportive care award. In 1997, he successfully petitioned to reopen his case because of worsening back problems and underwent a fifth surgery. Warner had a sixth surgery in 2005, and his claim remained open for active medical care until October 26, 2006, when the insurer issued a “Notice of Claim Status” informing him that his temporary benefits and active medical treatment had been terminated. Warner timely filed a Request for Hearing, in which he challenged the termination of his active benefits, arguing his medical condition was not stationary because he was in need of additional active treatment, including “the possibility of additional surgery.”

¶3 The review hearing was held on three successive dates, and three witnesses testified: Warner, his physician Dr. Dzioba, and Dr. Grimes, who had evaluated Warner at the request of the insurer. Dzioba stated that, as a result of Warner’s original injury, he had developed spinal stenosis—a narrowing of the spinal canal—and degenerative disk disease, both of which Dzioba had treated on an as-needed basis as Warner’s symptoms worsened. According to Dzioba, after Warner’s surgery in 2005, he had returned to a stable condition. Later, however, he began to complain of pain in the front of one of his thighs, which was corroborated by findings of a bone spur protruding from one of his spinal disks, additional narrowing of the central spinal canal, and bilateral narrowing of the foramen. Based on these findings, Dzioba did not recommend surgery because the stenosis was only mild to moderate. Instead he recommended a referral to a pain clinic for epidural steroid injections,

other pain medications, and continued observation to prevent further deterioration of his spine.

¶4 Dr. Grimes generally agreed with Dr. Dzioba about Warner's current condition and the appropriate treatment. However, the doctors disagreed about whether Warner's condition was stationary and whether the steroid injections should be characterized as active or supportive care. *See Rosarita Mexican Foods v. Indus. Comm'n*, 199 Ariz. 532, n.1, 19 P.3d 1248, 1251 n.1 (App. 2001) ("active care" is treatment intended to improve nonstationary condition); *Capuano v. Indus. Comm'n*, 150 Ariz. 224, 226, 722 P.2d 392, 394 (App. 1986) ("supportive care" is treatment for continuing symptoms of injury after condition stationary). After considering their conflicting opinions, the ALJ concluded "the opinion of Dr. Grimes is . . . most probably correct" and found Warner's condition stationary but "requir[ing] ongoing supportive care for the treatment of his continued pain complaints related to the injury." She awarded Warner four annual office visits and medication as prescribed by Dr. Dzioba, a referral to a pain clinic including medications and injections as prescribed, and a "CT/myelogram" that had been ordered in January 2007. She also affirmed a separate supportive care award from February 2007. Warner filed a "Request for Review" of the ALJ's decision, and the ALJ affirmed the award. This special action followed. We have jurisdiction pursuant to A.R.S. §§ 23-951, 23-943(H), and Rule 10, Ariz. R. P. Spec. Actions.

## Standard of Review

¶5 “We deferentially review the ALJ’s factual findings but independently review [her] legal conclusions.” *Grammatico v. Indus. Comm’n*, 208 Ariz. 10, ¶ 6, 90 P.3d 211, 213 (App. 2004). It is the ALJ’s province to resolve conflicts in expert testimony, and we are bound by that resolution unless no reasonable evidence exists to support it. *Kaibab Indus. v. Indus. Comm’n*, 196 Ariz. 601, ¶ 25, 2 P.3d 691, 699 (App. 2000). Similarly, we will not reverse an ALJ’s award if it is supported “by any reasonable theory of evidence.” *Id.*

## Discussion

¶6 Warner contends the ALJ’s decision is “contrary to law” to the extent it is based on Grimes’s opinion that although the pain clinic treatment would improve his subjective complaints of pain, it is nonetheless supportive care because it would not objectively improve his physical condition. Warner argues “the law defining when an injured worker is ‘stationary’ makes no distinction between improving an injured worker’s objective or subjective complaints.” The respondents, however, contend the ALJ made no finding that the treatment would improve Warner’s subjective complaints of pain, and, in any event, the pain treatment awarded is supportive rather than active care because it is intended to “improve a symptom by temporarily relieving it, but [is] not directed toward [Warner’s] recovery.”

¶7 After summarizing the testimony of both doctors, the ALJ found no dispute in the expert testimony about whether the injections were intended to improve Warner's subjective complaints of pain. She noted that "Dr. Grimes did not believe the pain clinic treatment was active care as it would improve applicant's subjective complaints rather than objectively change the applicant's condition." And she concluded that the only "distinction between the two [doctors'] opinions appears to relate to whether the ongoing care . . . is labeled active or supportive."

¶8 Thus, it appears from reading the decision as a whole that the ALJ at least implicitly did find the treatment would improve Warner's subjective complaints of pain. In any event, because there was no conflict in the medical testimony on this issue, she could not have concluded otherwise. *See Hopkins v. Indus. Comm'n*, 176 Ariz. 173, 177, 859 P.2d 796, 800 (App. 1993) (uncontroverted medical findings binding on Industrial Commission).

¶9 Warner contends that, having made such a finding, the ALJ could not then find his condition was stationary and conclude the treatment was therefore supportive rather than active. According to Warner, because the treatment will improve his "condition" by improving his pain, his claim "must remain open for active medical care, rather than the supportive care, since there is no distinction in the law regarding the determination of

whether a [claimant] can be considered medically stationary or not based on whether the medical treatment will improve the [claimant's] subjective or objective complaints.”<sup>1</sup>

¶10 Our courts have long held that fluctuations in pain and other incidental complications arising from the underlying injury, without accompanying changes in the physical findings, are insufficient to preclude a finding that the claimant's condition is stationary and prevent closure of the claim. In *Home Insurance Co. v. Industrial Commission*, 23 Ariz. App. 90, 91, 530 P.2d 1123, 1124 (1971), the claimant had been rendered quadriplegic by a work-related fall. Upon his release from the hospital, the insurer issued first a notice of claim status terminating his medical benefits and then a notice of permanent disability benefits, effectively finding him “permanently and totally disabled.” *Id.* at 91, 530 P.2d at 1125. The Industrial Commission Special Fund, which was required to take over medical payments upon permanent disability, filed a request for a hearing, arguing the claimant's condition was not yet stationary and the insurer's termination of his temporary benefits was premature. *Id.* at 91-92, 530 P.2d at 1124-25. Division One

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<sup>1</sup>Warner cites *Tarpy v. Industrial Commission*, 138 Ariz. 395, 397 n.1, 675 P.2d 282, 284 n.1 (App. 1983), in which Division One of this court found that an increase in subjective complaints without corresponding changes in objective findings is sufficient to reopen a claim. However, as Warner recognizes, the legislature effectively overruled *Tarpy* in 1999 when it amended A.R.S. § 23-1061(H) to preclude the reopening of a claim based solely on an increase in subjective pain. See 1999 Ariz. Sess. Laws, ch. 331, § 9. Nonetheless, in discussing *Tarpy*, Warner appears to suggest its reasoning survived the 1999 amendment “pertaining to the need for continuing treatment as active care based on a medical opinion that such treatment” would improve the worker's subjective complaints. We disagree; no court has cited *Tarpy* for that proposition since the statute was amended.

disagreed, holding that a claimant's medical condition becomes stationary once his "physical condition has reached a 'relatively stable status' so that nothing further in the way of medical treatment is indicated to improve that condition . . . even though the work[er]'s physical condition may involve a continuing need for medical benefits." *Id.* at 94, 530 P.2d at 1127, *quoting Aragon v. Indus. Comm'n*, 14 Ariz. App. 175, 176, 481 P.2d 545, 546 (1971). It then concluded the claimant's medical condition was stationary because the underlying neurological condition causing the quadriplegia had stabilized, despite medical testimony that, as a result of the injury, "[the claimant's] health is constantly in a state of flux, his condition will constantly deteriorate, require treatment, and then improve, while at the same time it may deteriorate in another respect." *Id.* at 96, 530 P.2d at 1129.

¶11 Similarly, in *Janis v. Industrial Commission*, 27 Ariz. App. 263, 263-64, 553 P.2d 1248, 1248-49 (1976), the claimant argued the Commission erred in finding his condition medically stationary because he had continuing pain that required active medical treatment including physical therapy, pain medication, and the possibility of another surgery. In assessing whether Janis's condition was stationary, Division One noted the "objective [in assessing whether a claimant's condition is stationary] is to determine whether, with the passage of time, the [claimant's] physical condition has evolved to that point where it can no longer be considered temporary, but rather should be considered permanent." *Id.* at 265, 553 P.2d at 1250, *quoting Home Ins. Co.*, 23 Ariz. App. at 94, 530 P.2d at 1127. The court then rejected Janis's argument, finding that a potential need for surgery in the future,



as distinguished from a present need for surgery based on a claimant's current condition, and increased pain, which could be managed by physical therapy and pain medication, demonstrated the claimant's condition was stationary, despite the ongoing need for treatment. *Id.*

¶12 A number of other cases have similarly distinguished between collateral symptoms and physical consequences a claimant experiences due to an injury and the injury itself when determining the status of the claimant's condition. *See Ossic v. Verde Cent. Mines*, 46 Ariz. 176, 180-81, 49 P.2d 396, 398-99 (1935) (condition stationary despite need for continual sinus irrigation to prevent infection); *Polanco*, 214 Ariz. 489, ¶¶ 10-11, 154 P.3d at 395 (condition stationary and claim not subject to reopening where reported increase in pain not accompanied by change in physical findings; subjective pain alone not compensable injury); *Simpson v. Indus. Comm'n*, 189 Ariz. 340, 346, 942 P.2d 1172, 1178 (App. 1997) (claimant's condition stationary despite residual pain); *Cassey v. Indus. Comm'n*, 152 Ariz. 280, 281, 731 P.2d 645, 646 (App. 1987) (claimant's condition stationary despite chronic muscular pain for which no further treatment available); *Sandoval v. Indus. Comm'n*, 114 Ariz. 132, 135, 559 P.2d 688, 691 (App. 1976) (claimant's condition stationary where recommended treatment would only address pain); *Continental Cas. Co. v. Indus. Comm'n*, 23 Ariz. App. 294, 296, 532 P.2d 869, 871 (1975) (where underlying condition causing pain stable but intensity fluctuated, claimant's condition stationary). Thus, contrary to Warner's argument, whether a claimant's condition is

“stationary” as defined in workers’ compensation law is determined by the status of the actual injury and not by a claimant’s pain or other consequential medical difficulties resulting from the injury. *See Janis*, 27 Ariz. App. at 265, 553 P.2d at 1250 (“A condition is ‘stationary’ where the underlying condition, the permanent residuals [sic] causing the pain, is stable, although the intensity of the pain may not be stable.”).

¶13 Turning to the facts of this case, the ALJ found “most credible” Dr. Grimes’s assessment that steroid injections would relieve Warner’s pain but not alleviate the underlying back problems. On this basis, she concluded Warner’s condition was stationary. As noted above, a claimant’s medical condition is stationary if his “physical condition has reached a ‘relatively stable status’ so that nothing further in the way of medical treatment is indicated to improve that condition . . . even though the work[er]’s physical condition may involve a continuing need for medical benefits.” *Home Ins. Co.*, 23 Ariz. App. at 94, 530 P.2d at 1127, *quoting Aragon*, 14 Ariz. App. at 176, 481 P.2d at 546; *see also Jessie’s Boat Shop & R.V. Repair v. Indus. Comm’n*, 155 Ariz. 380, 384, 746 P.2d 1310, 1314 (App. 1987); *Cleator v. Indus. Comm’n*, 129 Ariz. 179, 181, 629 P.2d 1015, 1017 (App. 1981).

¶14 Here, the testimony of both doctors indicated Warner’s condition had reached a “relatively stable status.” Dr. Dzioba testified as follows:

[Counsel for Warner]: And do you think . . . epidural steroids . . . are . . . designed to try to improve the patient’s condition?

[Dzioba]: That is correct.

[Counsel for Warner]: Okay. And is this, Doctor, just a symptomatic improvement, or does the epidural steroid . . . actually sometimes help?

[Dzioba]: It actually probably even helps. If you have severe stenosis, then it's—the compression has gone too far and then steroids probably don't help, but at this mild [to] moderate stage, they probably stabilize the so-called basement membranes of the nerves. That's kind of the theory behind utilizing this kind of treatment, so it's more than just symptomatic; it's meant to give him more miles without resorting to surgery.

. . . .

[Counsel for respondents]: [L]et's suppose, Doctor, if you will, that [Warner's] symptoms stay the same. . . . Is it possible that that might happen?

[Dzioba]: Yes, it is.

[Counsel for respondents]: And if that happens, for how long would you recommend that he receive pain management . . . ?

[Dzioba]: You know, as long as he's symptomatic.

[Counsel for respondents]: Okay. So he could be symptomatic for the rest of his life, and we hope he's not, but it's possible?

[Dzioba]: That's possible, correct.

¶15

Dr. Grimes testified:

[Grimes]: I think at this point in time he's stable and stationary and should have supportive treatment. As I read Dr. Dzioba's notes, he is not recommending surgery at this time, but

recommending only observation. He has recommended referral to the Pain Clinic. I think that's reasonable.

. . . .

[Counsel for respondents]: One of the things that Dr. Dzioba mentioned when he testified were these injections . . . . Dr. Dzioba said that these could be considered as active care because . . . they would give this gentleman more mileage . . . before his next possible surgery and, number two, they could have an anti-inflammatory effect[;] and thus reduction of the inflammation, in Dr. Dzioba's opinion[,], is something that would indicate some improvement in Mr. Warner's condition . . . .

In your opinion, would these types of injections be treatment intended to maintain the status quo level of wellness or are they something that we could expect to show objective improvement for Mr. Warner?

[Grimes]: I don't think that Pain Clinic treatment in general provides objective improvement in someone's condition. It may improve their condition subjectively. I don't see that as being any different, if it has an anti-inflammatory effect, than someone taking oral anti-inflammatories which we have provided under supportive care, so I consider the treatment to be supportive.

Although Dzioba's testimony that the injections could "actually . . . help" Warner's pain conflicted with Grimes's opinion that they would not treat the underlying conditions causing Warner's pain, the ALJ resolved the conflict by finding Grimes's opinion "the most probably correct." *See Kaibab Indus. v. Indus. Comm'n*, 196 Ariz. 601, ¶ 25, 2 P.3d 691, 699 (App. 2000). Reasonable evidence supports her conclusion. *Id.*

¶16 Furthermore, when read as a whole, Dzioba’s testimony demonstrates Warner’s condition was still relatively stable despite the increase in pain. There was no change in physical findings warranting surgery, and the recommended conservative treatment could conceivably manage and maintain his condition for the rest of his life without resort to surgery. *See Janis*, 27 Ariz. App. at 265, 553 P.2d at 1250 (mere possibility, as opposed to current necessity, of further surgery does not preclude condition’s being stationary). And when combined with Grimes’s opinion that the treatment was intended to maintain Warner’s “status quo level of wellness,” the testimony of both doctors supports the ALJ’s conclusion that Warner’s condition was stationary and in need of supportive care. The ALJ did not abuse her discretion in closing this claim.

¶17 Finally, we note the respondents assert Warner’s claim is frivolous and request an award of attorney fees as a sanction against him and his attorneys pursuant to Rule 25, Ariz. R. Civ. App. P. Although we reject the claim, we cannot say it is frivolous. In our discretion, we deny this request. *See Ariz. Dep’t of Revenue v. Gen. Motors Acceptance Corp.*, 188 Ariz. 441, 446, 937 P.2d 363, 368 (App. 1996).

### **Disposition**

¶18 For the reasons stated above, we affirm.

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GARYE L. VÁSQUEZ, Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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PHILIP G. ESPINOSA, Judge